

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH  
NORTHERN DIVISION

CHRISTOPHER JOSEPH TUVELL, )  
individually and as the heir of )  
David Christopher Tuvell, et al., )  
Plaintiffs, )  
vs. ) CASE NO. 1:12-CV-128DB  
BOY SCOUTS OF AMERICA, et al., )  
Defendants. )  
\_\_\_\_\_)

BEFORE THE HONORABLE DEE BENSON

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August 27, 2013

Motion Hearing

A P P E A R A N C E S

For Plaintiff: ROBERT GILCHRIST  
900 Parkside Tower  
215 South State Street  
Salt Lake City, Utah

For Defendant: DAVID CONCANNON  
Blue Water Scuba 200 Eagle Road  
Suite 116  
Wayne, Pennsylvania

GAINER WALDBILLIG  
175 South Main Street  
Suite 1600  
Salt Lake City, Utah

For Defendant: MICHAEL SKOLNICK  
Boy Scouts of America 10 Exchange Place  
Fourth Floor  
Salt Lake City, Utah

For Defendant: SPENCER BROWN  
Professional Association of 3 Triad Center  
Dive Instructors Suite 500  
Salt Lake City, Utah

Court Reporter: Ed Young  
247 U.S. Courthouse  
350 South Main Street  
Salt Lake City, Utah 84101-2180  
801-328-3202

1 August 27, 2013

2:30 p.m.

2 P R O C E E D I N G S

3  
4 THE COURT: Good afternoon.

5 Christopher Joseph Tuvell, et al., versus Boy  
6 Scouts of America, et al. 12-CV-128. We're here on  
7 defendant Blue Water Scuba's and Lowell Huber's motion to  
8 dismiss the first and third causes of action in the amended  
9 cross claim of the defendant Boy Scouts of America and Great  
10 Salt Lake Council of the Boy Scouts of America.

11 Representing the movants is -- yes, sir. Please  
12 tell me your name.

13 MR. WALDBILLIG: Gainer Waldbillig and David  
14 Concannon.

15 THE COURT: Thank you.

16 Mr. Concannon, you're here from Wayne,  
17 Pennsylvania?

18 MR. CONCANNON: That is correct, Your Honor. It  
19 is just outside of Philadelphia.

20 THE COURT: That is a long ways to come for this  
21 hearing, but it is nice to have you here.

22 MR. CONCANNON: Thank you very much.

23 THE COURT: For the defendants Boy Scouts of  
24 America and Great Salt Lake Council, Inc., Michael Skolnick.

25 MR. SKOLNICK: Good afternoon, Your Honor.

1 THE COURT: Good afternoon.

2 Are these other attorneys with your firm?

3 MR. SKOLNICK: No, Your Honor. They are  
4 representing other parties.

5 THE COURT: What are your names?

6 MR. GILCHRIST: Bob Gilchrist. I represent the  
7 plaintiffs, Your Honor.

8 THE COURT: I see. I thought you said they are  
9 parties, but they represent other parties.

10 MR. SKOLNICK: Yes.

11 THE COURT: You represent --

12 MR. GILCHRIST: Plaintiffs.

13 MR. BROWN: I am Spencer Brown and I represent the  
14 Professional Association of Dive Instructors.

15 THE COURT: The what?

16 MR. BROWN: Professional Association of Dive  
17 Instructors, P.A.D.I.

18 THE COURT: Okay. The dive instructors. It is  
19 nice to have you both here.

20 It is your motion, Mr. Waldbillig. Are you going  
21 to address it?

22 MR. WALDBILLIG: Mr. Concannon will, Your Honor.

23 THE COURT: Mr. Concannon, please.

24 MR. CONCANNON: Thank you, Your Honor.

25 May it please the Court, David Concannon for the

1 defendants Blue Water Scuba of Logan, Lowell Huber and  
2 Corbett Douglas.

3 It is a fairly straightforward motion under Rule  
4 12(b)(6) to dismiss two of the three counts of the  
5 cross-claim of the Boy Scouts. The first cross-claim is for  
6 breach of contract against Huber and Blue Water, and the  
7 second and the third are for indemnification against Huber  
8 and Blue Water, and those are at issue, and the second  
9 cross-claim for respondeat superior is not at issue in this  
10 motion.

11 The breach of contract cross-claim alleges that a  
12 contract that was entered into in 2010 between Blue Water  
13 and the Boy Scouts, and just so that I get the parties  
14 right, it is the Great Salt Lake Council B.S.A. and Blue  
15 Water Scuba of Logan. That contract on its face, and we  
16 have submitted it to the Court, was only for a term of three  
17 months, from June until August 31st of 2010, and then it  
18 expired on its face. There was no contract for the 2011  
19 season, which is when this unfortunate accident took place.  
20 The Boy Scouts are alleging that the contract somehow  
21 renewed itself by mutual assent and performance, which is  
22 kind of a vague allegation, and they have not acknowledged  
23 that they performed in 2011 and we have moved to dismiss  
24 that count for failure to state a claim.

25 There is no written renewal obviously that is at

1 issue and the parties to the renewal and the terms of the  
2 alleged renewal are not specified in the cross claim.

3 On the indemnification count, which is count  
4 three, there is no written contract of any kind for  
5 indemnification whatsoever. It is not addressed in the 2010  
6 agreement that they are alleging was breached. We don't  
7 know who the parties to this indemnification were supposed  
8 to be. Blue Water ceased business or its corporate  
9 registration expired in April of 2011 before the accident  
10 took place, and we don't believe that they have stated a  
11 claim upon which relief can be granted on count three.

12 Thank you.

13 THE COURT: Thank you very much.

14 Mr. Skolnick.

15 MR. SKOLNICK: Thank you, Your Honor.

16 May it please the Court, counsel, Your Honor, Blue  
17 Water's motion is essentially asking this Court to dismiss  
18 without any discovery, without any ability to find out what  
19 they say about specific allegations in the amended cross  
20 claim at this early stage of the case, and rule that right  
21 now the Court could not possibly find under the terms that  
22 have been pled a written contract which renewed by mutual  
23 assent and conduct in 2011. We would submit to the Court  
24 that that is an incorrect conclusion.

25 I would like to invite the Court's attention to

1 the contract itself. It has been provided to the Court  
2 among the papers from the Blue Water defendants. It is  
3 their first exhibit. The nature of the contract, Your  
4 Honor, is critically important, especially with respect  
5 to -- does the Court need a moment to find it?

6 THE COURT: I need it.

7 Do you have it? Do I have it in this book?

8 MR. SKOLNICK: It should be in the courtesy copies  
9 that we provided to the Court, Your Honor, at tab one.

10 THE COURT: I have it now.

11 Thank you.

12 MR. SKOLNICK: Thank you, Your Honor.

13 The reason that I invite the Court's attention to  
14 this and want to emphasize it is that Blue Water argues some  
15 very specific case law about why indemnification could not  
16 exist, why it should not be found and why the parties'  
17 relationship could never establish that. I think that is  
18 correct based on this contract and I will explain why. The  
19 cases that they cite talk about looking at the practical  
20 effect of the contract.

21 This contract, Your Honor, if you look at it, has  
22 a number of very specific duties imposed on the outfitter,  
23 Blue Water. The outfitter, Blue Water, does everything.  
24 That is appropriate because the outfitter, Blue Water, is  
25 the expert in diving. The Great Salt Lake Council is not an

1 expert in diving. If you look at the contract, in section  
2 three there is about one sentence or two sentences, rather,  
3 of things they are supposed to do. They are supposed to  
4 advertise before camp and they are supposed to help with  
5 registration.

6 If you look at section two of the contract, Blue  
7 Water does everything that has to do with diving. David  
8 Tuvell's death had to do with diving. It had to do with the  
9 services that Blue Water was providing through this  
10 contract. The reason that we believe that this contract  
11 governs and that the evidence will bear that out is because  
12 there is no other contract. There is no written contract.  
13 The Blue Water defendants have not come forward and said  
14 there is an oral contract, but, Your Honor, they have  
15 admitted in the pleadings filed in this case that they  
16 showed up in 2011 and provided services.

17 We will show eventually that they were the same  
18 services that they provided the year before. This contract,  
19 Your Honor, is very clear that it may be renewed by mutual  
20 agreement. There is a distinction that is also very clear,  
21 and if the Court looks at page 2 of the contract it says in  
22 paragraph four changes must be made by written agreement.

23 Now, Blue Water attempts to gloss over or perhaps  
24 confuse that issue and I want to straighten out any  
25 confusion that may exist. We don't allege in our amended



1 cross claim that there was any change. In fact, it is quite  
2 the opposite. We allege that it is the same deal as existed  
3 in 2010. If the Court looks at paragraph five, it says that  
4 it may be renewed annually upon the agreement of both  
5 parties. The Court I am sure will be sensitive to the fact  
6 that there is no mention of a written agreement of the  
7 parties, it just says agreement of the parties. That is  
8 what we have pled, that it renewed by agreement of the  
9 parties as evidenced by the fact that Blue Water shows up  
10 and Great Salt Lake Council registers and advertises and  
11 this boy, David Tuvell, does not die on the day in question.

12 We allege in our first cause of action breach of  
13 contract against Mr. Huber and Blue Water, that at a minimum  
14 they breached the contract by failing to name Great Salt  
15 Lake Council as an additional insured. In this 2010  
16 contract they are required to do that. They are supposed to  
17 provide \$2 million of insurance, Your Honor. The evidence  
18 that is before the Court is that we on behalf of our clients  
19 made a request and requested information about that and  
20 there is no insurance. They didn't perform that obligation.

21 So at this early stage of the pleadings, where all  
22 the pleadings are construed in a light most favorable to the  
23 non-movant, namely Great Salt Lake Council, the Court is to  
24 conclude that this contract renewed, renewed by mutual  
25 assent and conduct, and that there was a duty that was

1       breached here. Namely, you're supposed to insure Great Salt  
2       Lake Council for \$2 million.

3               It is obvious why that is. Again, it ties in to  
4       this indemnification cause of action, and it is because  
5       Great Salt Lake Council does not know anything about diving.  
6       They are not divers. They contracted with this outfitter,  
7       Blue Water and Huber, to provide that service. They  
8       understand that they are contracting with P.A.D.I., a  
9       certified nationally or internationally recognized dive  
10      organization, a certified provider of that service. Because  
11      they are not a provider themselves, Great Salt Lake Council  
12      wants Blue Water and Huber to obtain insurance and indemnify  
13      them, effectively indemnify them against any claim such as  
14      this. They don't want to be dragged into Federal Court in  
15      Salt Lake and sued for a boy's death who passes away during  
16      a dive.

17             Again, the effect of this contract is to seek that  
18      protection and that level of protection in terms of get us  
19      insurance, provide all of these services and you're  
20      responsible for them, not us.

21             THE COURT: Technically indemnification does not  
22      mean to provide insurance, and I don't have your complaint  
23      in front of me, but tell me exactly what your  
24      indemnification cause of action is based upon. Is it based  
25      solely upon the contractual provision?

1 MR. SKOLNICK: Yes, Your Honor.

2 It is based on this written contract that we argue  
3 renewed in 2011 and the effect of it.

4 THE COURT: But it is not a contract to indemnify  
5 directly, right?

6 MR. SKOLNICK: We would concede that it does not  
7 say indemnify in it, Your Honor.

8 THE COURT: Why, just out of curiosity for  
9 pleading purposes, why do you have a cause of action in  
10 which you seek indemnification? It sounds like what you're  
11 seeking is a breach of contract claim for failing to get the  
12 \$2 million insurance policy and put you on as an insured.

13 MR. SKOLNICK: We also have that, Your Honor.

14 THE COURT: Tell me why you need both. And, if  
15 so, how do you get to indemnification through being provided  
16 as an insured?

17 MR. SKOLNICK: I would be happy to address that,  
18 Your Honor. It ties in to what I was saying about the case  
19 law that the plaintiff relies on.

20 They cite a line of cases, including Kennecott  
21 Copper Corporation, and it is a Tenth Circuit case, and it  
22 is before the Court in their reply memorandum, and Kennecott  
23 Copper Corporation says that under Utah law, and I am  
24 reading at headnote three, the summary, under Utah law the  
25 actual effect of an agreement rather than its mere form

1 governs in determining whether rules governing  
2 indemnification should apply. That is why I was referring  
3 earlier, Your Honor, to the actual effect of this contract  
4 which renewed in 2011. The actual effect is to make this  
5 set of parties, the Blue Water defendants, responsible for  
6 the dive operation. B.S.A. or rather Great Salt Lake  
7 Council is not responsible for the dive operation.

8 When you look at the actual effect of the deal  
9 between the parties, you get us \$2 million of insurance and  
10 you perform all these dive functions, and the actual effect  
11 of that, I would submit, again, and it is in the early stage  
12 of the pleadings, is the indemnification or requirement to  
13 indemnify because they didn't get the insurance.

14 If they didn't get the insurance, what is our  
15 recourse? Well, you should have gotten us insurance. Shame  
16 on you. If they don't indemnify and if they don't have a  
17 requirement to step in and indemnify, we are prevented from  
18 appreciating the benefit of our bargain, which is we're  
19 going to be protected against having to step in and defend  
20 against a case like this where negligence in providing the  
21 dive operation is what is alleged.

22 THE COURT: Right, but wouldn't you get to the  
23 same place with a breach of contract claim?

24 MR. SKOLNICK: We may or may not, Your Honor.

25 THE COURT: Well --

1 MR. SKOLNICK: We may or may not. It may be a  
2 belt and suspenders approach, and the Court may think that  
3 just the breach of contract is enough, and that is all that  
4 the Court can really see, but I would just submit that at  
5 this early stage the Court should view the pleadings in a  
6 light most favorable to the Great Salt Lake Council, and  
7 give us an opportunity to at least explore whether the  
8 actual effect of this document, including the intent of the  
9 parties, was to indemnify and make Mr. Huber and Blue Water  
10 responsible.

11 I think it is even more important when we learn  
12 that Blue Water is out of business, so now we only have  
13 Huber to look to. Mr. Huber is an individual, not an  
14 entity, and we don't know what assets he may have. We don't  
15 know what ability to defend he may have. We suspect he is  
16 defending here under some policy of insurance that at least  
17 named him and Blue Water as insureds. We have not been able  
18 to do any discovery to verify that yet.

19 Again, Your Honor, it is more of a close question  
20 on the indemnification than on the breach of contract, and  
21 we concede that and there is not an express provision, but  
22 you don't look to necessarily just the express provision,  
23 and under the law that Blue Water's own counsel has cited to  
24 the Court, this Kennecott Copper case, and the Utah line of  
25 cases that they cite is similar.

1 I am looking at the Meadow Valley Contractors  
2 case, which is a Utah Court of Appeals case, and if you look  
3 at paragraph 19 in that case, it talks generally about what  
4 Blue Water is arguing here, that the mere agreement to  
5 provide insurance in and of itself does not mean that you  
6 have an indemnification obligation.

7 Now, I inserted the phrase in and of itself in my  
8 interpretation of that, but I submit to the Court that that  
9 is a reasonable interpretation, if you look at this universe  
10 of case law that we have been talking about and the actual  
11 effect of the document. You don't just look in isolation  
12 and say, okay, the contract says you have to insure, but it  
13 does not specifically say indemnify so there is no duty to  
14 indemnify. It is a broader analysis than that, I would  
15 submit to the Court, and we need an opportunity to explore  
16 it at this early stage.

17 THE COURT: In the reply brief the movant says,  
18 and I'm quoting from their brief --

19 MR. SKOLNICK: At what page, Your Honor? I have  
20 it handy.

21 THE COURT: Page 4.

22 In the Kennecott Copper case the Tenth Circuit  
23 rejected an attempt by General Motors to force Kennecott  
24 Copper to indemnify when the latter had only agreed to  
25 provide insurance.

1 MR. SKOLNICK: I see that, Your Honor, and I  
2 appreciate that argument, but they didn't in their reply  
3 brief talk about this actual effect language in Kennecott  
4 Copper. That has not been mentioned or discussed at all. I  
5 read to the Court what the Kennecott Copper court said about  
6 looking at the actual effect, and beyond the headnote it is  
7 even more explicit if you look further on in the case in  
8 headnotes two and three, and at the end of that section it  
9 says we are satisfied that Utah would look to the actual  
10 effect of the agreement rather than its mere form to  
11 determine whether the rules governing indemnification should  
12 apply.

13 Again, it comes back, Your Honor, to the same  
14 thing I have been advancing to the Court, actual effect, and  
15 if you look at the actual effect of that contract, it is to  
16 make Blue Water and Huber responsible, not Great Salt Lake  
17 Council, because of this area of very specialized knowledge  
18 and skill that is involved here.

19 THE COURT: Then why didn't they just put in the  
20 contract an agreement to indemnify?

21 MR. SKOLNICK: I guess they could have done that  
22 and I guess in an ideal world they would have done a written  
23 contract in 2011, but we're dealing with a charitable  
24 organization that has a broad volunteer base and a  
25 relatively small professional staff and they are stretched

1 pretty thin.

2 I think that once we eventually get to trial if we  
3 were looking at why specific terms were not put into the  
4 contract, I would be offering some evidence about that, but  
5 I think that is the best I can do in response to the Court's  
6 question today. Number one, I don't know, and, number two,  
7 those are what I suspect are some of the factors involved.

8 THE COURT: You want to get something that your  
9 client didn't specifically contract for. You contracted for  
10 something different, at least on its face, and there is a  
11 difference between requiring the contracting partner to  
12 cover you with insurance than to indemnify.

13 MR. SKOLNICK: Well, if you look at the actual  
14 effect, Your Honor, and coming back to that, and I may  
15 disagree with the Court about this, but I will take a stab  
16 and see if I can parse our differences, but I think the main  
17 difference is with respect to what did the parties intend.  
18 We don't know that at this stage. I think the contract may  
19 be somewhat ambiguous on that point, but if we're talking  
20 about contract interpretation, it would be good to have some  
21 evidence about what the intent was by both sides.

22 Aside from intent --

23 THE COURT: Well, it is not very ambiguous, it  
24 seems to me.

25 MR. SKOLNICK: I would submit the same thing, Your



1 Honor, that --

2 THE COURT: There is nothing particularly  
3 ambiguous about outfitter agrees to provide scouts with  
4 evidence of liability insurance in the amount of \$2 million,  
5 and agrees to name the Great Salt Lake Council, B.S.A., as  
6 an additional insured on the policy.

7 That is pretty clear.

8 MR. SKOLNICK: Your Honor, I submit that 2-D is  
9 also very clear. Outfitter, that is Blue Water, agrees to  
10 observe all B.S.A. safety rules and policies in the  
11 operation of the programs. Well, it is alleged that they  
12 didn't do that, so is B.S.A. now going to be required to  
13 defend and indemnify themselves because they didn't do that?  
14 That is the actual effect of not finding that an  
15 indemnification agreement exists. It comes down to the  
16 purpose of the contract and the effect of the contract, Your  
17 Honor, again, pursuant to their own case law that they are  
18 advancing in their reply memo.

19 THE COURT: Anything else?

20 MR. SKOLNICK: May I just review for a moment?

21 THE COURT: Yes.

22 MR. SKOLNICK: I think I may be done, but I want  
23 to make sure that I covered everything that I intended to.

24 I think it is instructive, Your Honor, to look at  
25 the answer that was filed by Blue Water. This is docket

1 number 65, paragraph 13, where Blue Water admits the  
2 following things, including that David Tuvell was, quote,  
3 participating in a discover scuba program offered by  
4 G.S.L.C., Lowell Huber and/or Blue Water Scuba. So they  
5 lump all of those parties together without reference to what  
6 the individual parties' responsibilities are. Where can we  
7 determine those individual responsibilities if not the  
8 contract that we argue renewed in 2011?

9 That reminds me, Your Honor, that I have not spent  
10 a lot of time on the statute of frauds argument, and I would  
11 be happy to address that if it is of concern to the Court.

12 THE COURT: I don't think so, but tell me, in 2010  
13 did the outfitter provide the insurance?

14 MR. SKOLNICK: I don't know the answer to that,  
15 Your Honor.

16 THE COURT: What if they didn't, then where are  
17 you going to be on your renewal claim?

18 MR. SKOLNICK: Well, I don't know, Your Honor. I  
19 suppose if the Great Salt Lake Council did not insist on  
20 that provision being observed in 2010, it might be some  
21 argument against renewal, but I don't think it would be  
22 decisive by any means.

23 THE COURT: I just wondered.

24 MR. SKOLNICK: I think it could be a factor to be  
25 considered. I don't think it would be decisive. It may not

1 even be informative. It may just be a term that was not  
2 enforced in 2010 but renewed in 2011 and was required in  
3 2011.

4 THE COURT: Then you would really need  
5 indemnification.

6 MR. SKOLNICK: Then we might be more in need of  
7 it, Your Honor. That is a good point and I agree.

8 THE COURT: Thank you.

9 MR. SKOLNICK: All right.

10 THE COURT: Thank you for your argument.

11 Let me hear your response --

12 MR. CONCANNON: Thank you, Your Honor.

13 THE COURT: -- Mr. Concannon.

14 MR. CONCANNON: With all due respect to Mr.  
15 Skolnick, who I just met today for the first time --

16 THE COURT: I didn't mean to bypass you two.  
17 You're kind of pushed back like you are not up to the table.  
18 I didn't ask you, but if you want to speak ever during this,  
19 let me know.

20 MR. GILCHRIST: We are up to the task but not up  
21 to the table. Thank you.

22 THE COURT: Go ahead.

23 MR. CONCANNON: Thank you.

24 I didn't hear Mr. Skolnick answer the Court's  
25 question about whether the contract specifically provided

1 for indemnification other than say, no, it does not. It is  
2 clear. This is a very short agreement. It is two pages.  
3 It is not clear who drafted it, and I don't believe that  
4 Mr. Huber drafted it, but it would have been easy for the  
5 drafter to have put in there that you provide insurance and  
6 indemnification. It would have been easy for the drafter to  
7 put in there not that this contract expires on August 31st,  
8 2010, but that the term of the contract this year is until  
9 August 31st and it renews automatically thereafter unless  
10 terminated by mutual agreement of the parties. That is not  
11 here.

12 As far as indemnification is concerned, I think  
13 the four corners of the agreement are fairly clear, and it  
14 is a very brief agreement and it provides for some very  
15 specific stuff, advertising, who collects the money, who  
16 does what, and it would have been easy for them to put  
17 indemnification in here if the parties intended that.

18 I am not familiar with a provision in the Federal  
19 Rules of Civil Procedure that allows you to think of a  
20 potential claim, get discovery on it, and then assert it  
21 later. We are here because there is no claim upon which  
22 relief can be granted on indemnification. There is no  
23 written contract. There is no case law provided by the Boy  
24 Scouts. There is nothing but Mr. Skolnick on contracts. It  
25 is a very broad interpretation of a very simple, easy to

1 understand document that says that it provides for something  
2 that the parties did not express.

3 It could have been that the intent of the parties  
4 was to provide pizza on Thursdays, but it is not in here and  
5 it stretches the credibility of the interpretation of this  
6 agreement to say that you should have put in  
7 indemnification, which is pretty serious, pay for an  
8 attorney of our choice to defend this case through trial,  
9 and we didn't bring it up and we didn't put in the contract  
10 that that is what we intended in a written agreement when  
11 the four corners of the written agreement are very specific.

12 THE COURT: Why would it necessarily include pay  
13 for an attorney? The insurance would have done that.

14 MR. CONCANNON: You would think that it would, and  
15 that is why it should be in writing, but what the Boy Scouts  
16 have asked Mr. Huber to do is pay for counsel of their  
17 choosing in addition to indemnify, in addition to provide  
18 insurance, and that is the demand that came from  
19 Mr. Skolnick's office. When they found the agreement that  
20 had terminated on its face, then they asked for us to pay  
21 for their defense in addition to Mr. Huber's defense. That  
22 is what they want. That is why they filed this cross claim.  
23 I don't see where that is anywhere in here.

24 That is the other issue here is what are the terms  
25 of the proposed indemnification agreement? What are we

1 supposed to be agreeing to? What are the limits? It is  
2 just not there.

3 THE COURT: Do you know if there was insurance  
4 provided under the 2010 contract?

5 MR. CONCANNON: I do not know. I do not know the  
6 answer to that question, but I can easily find out.

7 THE COURT: Apparently you're not hired by an  
8 insurance company?

9 MR. CONCANNON: I actually am.

10 THE COURT: Under that contract?

11 MR. CONCANNON: I am under a term of insurance  
12 that began on July 1st, 2011. The policy period was  
13 July 1st to June 30th of 2012. I know that. I just don't  
14 want to speculate, and frankly I handle these cases all over  
15 the country and I don't pay attention to when a policy -- I  
16 know when it began, but if it is not part of what I need to  
17 do, I don't do it.

18 I can say this, that I know from investigating  
19 this accident five days after it happened that there was not  
20 a meeting of the minds between Huber and the Boy Scouts on  
21 what was supposed to be done. If you want to talk about the  
22 intent of the parties in the agreement, who is an expert in  
23 providing scuba diving, and there is a premises liability  
24 claim asserted here against the Boy Scouts, and who is an  
25 expert in keeping young boys safe on the property that is

1 not Huber. That is the Boy Scouts. This accident occurred  
2 in a roped off swimming area where guards had been provided  
3 in 2010 when Mr. Huber and Blue Water, actually, more  
4 accurately, had agreed to provide insurance, but they were  
5 pulled in 2011.

6 If you want to go down this hole and waste  
7 resources on whether or not there was indemnification or  
8 there was removal and get into all that, which is a sideshow  
9 to the real issues here, we're going to get into whether or  
10 not Mr. Huber or Blue Water would have agreed to provide  
11 insurance to a party that was not following their own safe  
12 standards.

13 So we will go that way if we have to, but I don't  
14 believe that this very simple agreement -- it says what it  
15 says and it says that a change has to be in writing. The  
16 terms of a contract is an integral part of the contract and  
17 the parties to a contract are an integral part and  
18 performance is an integral part and consideration is an  
19 integral part. You can't just say that something happened  
20 because of verbal -- when the contract says any changes have  
21 to be in writing.

22 That is why we have moved to dismiss the first  
23 counterclaim of breach of contract. Then when you want to  
24 get to indemnification and you want to create provisions  
25 that are not there at all, not just, well, paragraph five

1 does not say writing, but for something else entirely, I  
2 just think that that stretches the bounds too far and is  
3 beyond the pale.

4 Thank you.

5 THE COURT: Thank you.

6 MR. SKOLNICK: Your Honor, may I be heard briefly?

7 THE COURT: Yes, please.

8 MR. SKOLNICK: Thank you.

9 Your Honor, I would just ask that the Court  
10 disregard the proffer of evidence about what the intent of  
11 the parties was offered by counsel. I don't think that  
12 should be considered by the Court and it is not before the  
13 Court, as to Mr. Huber negotiating experts and I  
14 investigated five days after, and that is not before the  
15 Court and should not be factored into the Court's decision.

16 THE COURT: Well, I don't think he said anything  
17 about intent. It is okay. I am not going to consider  
18 anything that is not in the record evidence.

19 MR. SKOLNICK: Thank you, Your Honor.

20 THE COURT: Nothing else?

21 MR. SKOLNICK: No, Your Honor. That was all.

22 THE COURT: I asked my clerk to bring me a copy of  
23 the amended complaint.

24 Is it entitled amended complaint? Is it a second  
25 amended complaint or what is it?



1 MR. WALDBILLIG: I believe it is just the  
2 complaint.

3 THE COURT: I don't mean the complaint. I mean  
4 the cross claim.

5 MR. SKOLNICK: Our cross claim, Your Honor?

6 THE COURT: Yes.

7 MR. SKOLNICK: I believe I have that.

8 May I approach?

9 THE COURT: Yes, please.

10 MR. SKOLNICK: I believe that is it.

11 THE COURT: Now, in this cross claim, on the  
12 indemnification cross claim, Mr. Skolnick, you conclude with  
13 your paragraph 33 which says pursuant to Utah Code Annotated  
14 Section 78-B-5-823 G.S.L.C. is entitled to indemnification.

15 Explain that a little further to me.

16 MR. SKOLNICK: Your Honor --

17 THE COURT: It does not appear to be contract  
18 based.

19 MR. SKOLNICK: I apologize, Your Honor. I looked  
20 at it briefly before I came over, and I meant to bring a  
21 copy of the statute, but I don't have that before me.

22 THE COURT: How does that statute give you an  
23 indemnification claim?

24 MR. SKOLNICK: That is what I'm saying. I am not  
25 prepared to argue that. I apologize. If it is important to

1 the Court --

2 MR. WALDBILLIG: Your Honor, I believe it is the  
3 comparative fault statute that is the section he is  
4 referring to, but I am not positive. I think that is what  
5 he is referring to. If that is true, then it just means  
6 that there is no implied indemnity and there is no  
7 contribution indemnity under the --

8 MR. SKOLNICK: That refreshes me, Your Honor, and  
9 I appreciate counsel's courtesy with that.

10 It is with respect to the claims in the complaint  
11 against Blue Water and what Blue Water is claimed to have  
12 done and failed to do and us not being held -- us, Great  
13 Salt Lake Council, not being held responsible for their  
14 negligent conduct, if any.

15 THE COURT: All right. But not relying on that  
16 provision, it appears that your indemnification claim is  
17 based entirely on the insurance clause in the contract,  
18 correct?

19 MR. SKOLNICK: No. I would disagree respectfully  
20 with the Court. It is also based on the actual effect of  
21 the contract, and taking into account the respective  
22 responsibilities that are set out in paragraphs two and  
23 three.

24 THE COURT: Okay. But you do agree that they are  
25 incorrect in understanding that your indemnification claim

1 is based on a breach of contract?

2 MR. SKOLNICK: It is based on that written  
3 contract that we say renewed in 2011, correct, Your Honor.

4 THE COURT: Well, it gets a little muddy to me.  
5 The outfitter clearly agrees in the contract to observe all  
6 of the B.S.A. safety rules and policies in the operation of  
7 the program. I assume it is your argument that if they  
8 didn't do that and that as a result the Boy Scouts are held  
9 liable for something to the plaintiff here, that that should  
10 trigger some entitlement to damages on your part because of  
11 that breach of contract?

12 MR. SKOLNICK: Correct.

13 THE COURT: You think that is synonymous with  
14 indemnification?

15 MR. SKOLNICK: The actual effect is synonymous,  
16 correct, Your Honor.

17 THE COURT: Understood that way, it is just  
18 another breach of contract claim. You call it  
19 indemnification, but it is really just another breach of  
20 contract claim.

21 MR. SKOLNICK: I suppose it could be characterized  
22 that way, Your Honor, in the way that the Court has, and it  
23 may be a matter of rubric, and it may be a belt and  
24 suspenders approach, but we feel strongly that we have a  
25 right under those contractual provisions to have them be

1 responsible financially for what was alleged to have  
2 happened to this young man, not us.

3 THE COURT: Does that include hiring an attorney  
4 to defend you?

5 MR. SKOLNICK: Well, we have asked for that and  
6 they have graciously declined.

7 THE COURT: As you said to be responsible for the  
8 harm caused to this family, and that is where you have to  
9 scratch your head.

10 How far does indemnification go?

11 MR. SKOLNICK: I think that you have to look back  
12 at the terms of the contract, and they should be required to  
13 defend with respect to 2-A through 2-F, and in particular  
14 2-A, provide all of the equipment and facilities and provide  
15 for upkeep and care.

16 For instance, if the tanks were faulty, if the  
17 underwater course that was designed by Mr. Huber and Blue  
18 Water was faulty and contributed, why should B.S.A. have to  
19 defend those things? It is Mr. Huber's responsibility under  
20 this contract, Your Honor, to do that. If Mr. Huber didn't  
21 have B.S.A.'s safety rules being applied and followed, that  
22 is his responsibility under this contract.

23 We understand that there may be a defense advanced  
24 by Blue Water that you said that you would get volunteers  
25 for waterfront safety, but that is not what this contract

1 says.

2 THE COURT: Right, but we don't know exactly what  
3 indemnify means.

4 MR. SKOLNICK: I would concede that, Your Honor.  
5 It is suggested by 2-A through F.

6 THE COURT: You keep mixing it up. You want to  
7 say why should we have to defend ourselves, and the  
8 indemnification term or the indemnification agreement could  
9 include providing a defense as well as responding to the  
10 loss, right?

11 MR. SKOLNICK: Correct, Your Honor.

12 THE COURT: How are we going to know? You have  
13 said several times it wouldn't be fair for the Boy Scouts to  
14 respond with either a defense or to pay for this lawsuit if  
15 it was Mr. Huber that caused it, right?

16 MR. SKOLNICK: I think the Court can --

17 THE COURT: Are we just turning the law into one  
18 big ball of fairness?

19 MR. SKOLNICK: No, Your Honor.

20 I think the Court should err on the side of  
21 finding a degree of definition, of definiteness in this  
22 contract, and I would concede that that probably does not  
23 include paying for an attorney right now. It may in the  
24 future require them to reimburse our firm's fees. If at the  
25 end of the day we rack up hundreds of thousands of dollars

1 in defense costs because we were brought into this case  
2 because they were negligent for not doing 2-A through F,  
3 then we may have a claim against them because we were  
4 damaged by that.

5 THE COURT: I suppose it is not enough to have  
6 faith in the jury system.

7 MR. SKOLNICK: If only it were, Your Honor.

8 THE COURT: In closing argument you want to say we  
9 were not negligent at all. They were. Right?

10 If the jury comes back and finds them negligent  
11 and not you, then all is well, at least in terms of your  
12 being responsible for any losses. But if the jury somehow  
13 comes back and holds you both liable, then you want to be  
14 able to say we get indemnified somehow.

15 MR. SKOLNICK: We get indemnified for you.

16 THE COURT: Couldn't that same jury sort out that  
17 question of fact?

18 MR. SKOLNICK: It may or may not. They may  
19 apportion fault to us that really should not be apportioned  
20 to us. The only thing that we're responsible for in here is  
21 advertising and pre-camp registration.

22 THE COURT: Do we send to the same jury the  
23 question of comparative fault, plus whether Blue Water Scuba  
24 and Mr. Huber breached the contract and need to indemnify  
25 you?

1 MR. SKOLNICK: We may need to under the cross  
2 claim.

3 THE COURT: But don't the two concepts just  
4 combine?

5 MR. SKOLNICK: I don't know that they --

6 THE COURT: Well, if they didn't provide the  
7 equipment as required, and if they didn't follow the safety  
8 rules as required and that adds up to their negligence, then  
9 why would we even be talking about the second question of  
10 whether they breached the contract by not doing those things  
11 and, therefore, are required to indemnify?

12 MR. SKOLNICK: We might not, Your Honor, but as  
13 defense counsel, I want to have that question on the special  
14 verdict as to whether they breached their contract and  
15 breached their duty to my client, number one, and whether  
16 they have a duty to indemnify my client.

17 THE COURT: I think we would have a jury that  
18 would be just utterly confused, but we're getting way, way  
19 ahead of ourselves. I asked the question.

20 Thank you.

21 I recognize that the first cause of action in the  
22 cross claim and the third cause of action to both be based  
23 on allegations of breach of contract. On that basis I'm  
24 denying the motion. I find that there is enough evidence to  
25 support the possibility of renewal by the action of the

1 parties and performance under the contract by the action of  
2 the parties.

3           There appears to be no doubt that the outfitter  
4 showed up the next year. I'm satisfied that under contract  
5 law there is enough at least to suggest facts that may  
6 constitute a renewal by action, and, of course, the conduct  
7 of the parties. I am not, by ruling this way, validating an  
8 indemnification claim. I am not. It is labeled that in the  
9 cross claim. That is about the only place I think the word  
10 is used until paragraph 33 when indemnification is only  
11 associated with Section 78-B-5-823 of the Utah code. I may  
12 have missed it somewhere else.

13           Otherwise, your third cause of action, Mr.  
14 Skolnick, appears to me to be based solely on a breach of  
15 contract theory. I'll let it go forward on that basis, but  
16 I want it to be clear that I am not recognizing an  
17 indemnification claim. If discovery should expose one, I  
18 will allow a request for leave to amend the complaint. For  
19 the law of the case I want that to be clear. At this point  
20 I see no contractual basis for arguing that there is an  
21 indemnification provision. There is only a provision that  
22 requires what is required in 2-A through F, and that  
23 includes the insurance provision and the agreement to  
24 observe safety rules and so on.

25           If in the end that amounts to something like



1 indemnification, I would prefer to slug out that legal  
2 battle later, but right now I see two breach of contract  
3 claims which I find sufficiently pled to allow discovery to  
4 go forward.

5 Do you need clarification on that or do you have  
6 any questions?

7 MR. SKOLNICK: Not on my part, Your Honor. Thank  
8 you.

9 THE COURT: Over on this side, Mr. Concannon?

10 MR. CONCANNON: No. Thank you, Your Honor. That  
11 is clear.

12 THE COURT: I wonder if you would draft something  
13 up in that regard including my language about  
14 indemnification?

15 MR. CONCANNON: Yes.

16 THE COURT: Thank you for your arguments. It is  
17 kind of an interesting thing.

18 Are we getting close to settling this thing? No?  
19 I don't see any indication of that.

20 Thank you.

21 We'll be in recess.

22 MR. BROWN: Your Honor, I am sorry, but I had one  
23 small matter I was hoping the Court could address. There is  
24 a motion for a protective order floating around. P.A.D.I.  
25 and the plaintiffs had jointly moved for a protective order

1     pertaining to an agreement that was reached between P.A.D.I.  
2     and the plaintiffs that we needed to disclose to the other  
3     parties and to disclose to the Court. Blue Water had  
4     responded to our motion and proposed an alternative  
5     protective order, and we filed a reply saying we are fine  
6     with the form of the order that Blue Water proposed, but  
7     nobody else had responded to it. I brought copies of the  
8     order, and I wondered if the Court wouldn't mind considering  
9     signing that today?

10           THE COURT: Does every party agree to it?

11           MR. BROWN: Yes, Your Honor.

12           THE COURT: Well, then I will gladly sign it.

13     Bring it up.

14           MR. BROWN: I do have copies for anybody else that  
15     wants --

16           MR. WALDBILLIG: I assume that the order will come  
17     out on the electronic filing.

18           MR. BROWN: Okay.

19           THE COURT: All right. On the order I am  
20     scribbling out proposed and I signed the protective order.

21           MR. BROWN: Thank you very much.

22           THE COURT: We are in recess.

23           (Proceedings concluded.)  
24  
25